Supreme Court, U.S.
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No. 99-243

IN THE

Supreme Court of the United States

Scot L. Zimmerman,
Petitioner,

v.

State of Oregon Department of Justice,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

Because Respondent has asserted its Eleventh Amendment immunity from suit under Title II, BIO 2, this Petition should be granted or, in the alternative, held pending the disposition of No 98-796, *United States* v. *Florida Board of Regents*. The Court has held another petition addressing states' immunity from suit under Title II. No. 98-829, *Florida Dept. of Corrections* v. *Dickson*. (Petitioner is aware of two other petitions that raise the identical issue. No. 99-461, *WMATA* v. *Swanks* (brief in opposition filed Nov. 9, 1999); No. 99-423, *Alsbrook* v. *Maumelle, AK* (brief in opposition due Dec. 8, 1999)). In the Petition is held, within seven days of this Court's decision in the *Florida Board of Regents* case, Petitioner will file a supplemental brief addressing whether certiorari should be granted or the case remanded to the Ninth Circuit for further consideration.

Respondent is wrong to contend that the Petition should be denied. At the very least, the conflict in the circuits over states' immunity from suit under Title II, *see* Pet. 12-13, is an important constitutional question directly implicated by the pending *Florida Board of Regents* case. In addition, the Ninth Circuit's holding that Title II does not reach employment discrimination flatly conflicts with the contrary holding of the Eleventh Circuit in *Bledsoe* v. *Palm Beach County Soil & Water Conservation District*, 133 F.3d 816, *cert. denied*, 119 S. Ct. 72 (1998). The Ninth Circuit consciously created the circuit split, Pet. App. 35a, and Respondent expressly recognizes the conflict as well, BIO 2. The division in circuit authority, together with the fact that the decision below invalidates a binding federal regulation, plainly merits review in this Court.

Respondent nonetheless contends that certiorari should be denied because it "believes" that there is a "reasonable probability" that in the future other circuits "will side with the Ninth Circuit's" reading of Title II. BIO 2. Not only is that

course of events exceptionally unlikely, *see infra*, but it is also totally irrelevant because the later developments Respondent imagines would not resolve the circuit conflict and thus would not obviate the need for this Court to grant to decide the question presented. In particular, Respondent cannot and does not contend that the Eleventh Circuit, which refused to rehear *Bledsoe* en banc without a single judge calling for a vote, will completely reverse course and agree with the Ninth Circuit. The circuit conflict accordingly will remain unresolved until this Court intervenes.

Respondent must therefore proffer some reason why this Court should defer resolving the question presented, but it pointedly fails to do so. The most that Respondent can say is that the circuit conflict will induce "litigants in other circuits [to] call upon their courts to address the issue as well." BIO 5. But that is precisely Petitioner's point: failing to grant certiorari in this case will result in nothing more than needless litigation over the scope of Title II. Courts may line up in support of the two competing positions, but that process will benefit no one at all. Respondent's suggestion that is as yet uncertain whether other procedural requirements of Title I implicitly apply to claims brought under Title II is irrelevant: that issue has not divided the circuits and it is not relevant to the question presented by this Petition, which is simply whether a claim of employment discrimination may be brought under Title II.

Nor is there reason to believe that this Court will benefit from further percolation of the issue in the lower courts. The proper construction of Title II has been the subject of the Department of Justice's regulatory process, followed by considered decisions of two circuits and the extensive dissent from the denial of rehearing en banc in this case, as well as more than a dozen rulings of federal district courts. *See* Pet. 8-10. In each instance, the statute's text and legislative history have been explored in detail. All that remains is for this Court to resolve the question conclusively.

In addition, there is no reason to believe that other courts will agree with the Ninth Circuit's decision. The decision below conflicts with an extraordinary array of judicial authority – not just the Eleventh Circuit's decision in *Bledsoe* but also decisions of district courts in *eleven* different circuits, *see* Pet. 10 – as well as with the Department of Justice's binding construction of Title II. Respondent suggests that the strength of the Ninth Circuit's reasoning is overpowering but it is telling that the brief in opposition fails to even *attempt* to defend the merits of the decision below. In point of fact, the decision in this case failed to convince even the Ninth Circuit, as three judges openly dissented from the denial of rehearing en banc, publishing a devastating critique of the panel opinion. Pet. App. 36a-51a. The suggestion that other circuits henceforth will uniformly adopt the view of the Ninth Circuit is accordingly insupportable.

Respondent next suggests that the question presented is insufficiently important to merit review in this Court, but plainly that is not correct. The conflict in the circuits creates an intolerable uncertainty over the scope of a major federal civil rights statute and the process for bringing discrimination claims against states. Respondent implicitly acknowledges the grave effects of this uncertainty when it predicts that the decision below will generate litigation in other circuits over the scope of Title II. *See supra.* Certainly, this case merits review at least as much as *West* v. *Gibson*, 120 S. Ct. 297 (1999), in which certiorari was granted after the Seventh Circuit held, in conflict with the Eleventh Circuit, that requests for *interest* (*i.e.*, only one element of the plaintiff's claim) are not subject to Title VII's administrative exhaustion requirements.

Respondent's final argument that it intends to make arguments in this Court that it neglected to raise below, and certiorari accordingly should be denied, barely merits a response. Respondent is under the serious misimpression that it may raise any argument it likes in support of the Ninth Cir-

cuit's judgment, no matter whether it made that argument below. BIO 9 n.2. In fact, this Court will not consider arguments raised for the first time in a brief in opposition to the petition for certiorari. *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1449 (1999). The exception is that Respondent may challenge the federal court's jurisdiction over this suit, including by asserting sovereign immunity. Pet. 14.

CONCLUSION

For the foregoing reasons, the Petition should be granted or held pending the disposition of No 98-796, *United States* v. *Florida Board of Regents*.

Respectfully submitted,

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